MARY C. PEMBERTON

IBLA 78-522 Decided May 21, 1980

Appeal from decision of Montana State Office, Bureau of Land Management, rejecting color-of-title application M-40120.

Affirmed.

1. Color or Claim of Title: Generally -- Color or Claim of Title: Description of Land -- Color or Claim of Title: Good Faith

Where a hearing is held to allow an applicant to introduce extrinsic evidence in a color-of-title proceeding to make definite a description in a quitclaim deed which is ambiguous as to what lands are conveyed, and the applicant does not succeed in providing clear and convincing evidence that the deed did convey color of title or that the grantee had any reasonable basis to believe he was obtaining good title to the applied for land, the application is properly rejected.

APPEARANCES: Rodney T. Hartman, Esq., Billings, Montana, for appellants; Richard K. Aldrich, Esq., Office of the Solicitor, Department of the Interior, Billings, Montana for the Government.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Mary C. Pemberton originally appealed a June 6, 1978, decision of the Montana State Office, Bureau of Land Management (BLM), rejecting her color-of-title application M-40120 to purchase a 1.48-acre parcel of land situated in Lot 18 of sec. 26, T. 9 S., R. 14 E., Montana principal meridian, in Park County, Montana. The application was filed under the Color of Title Act, 43 U.S.C. § 1068-1068a (1976), and 43 CFR Part 2540, which allow for the purchase of Federal lands by certain classes of persons holding what appears to be valid title to land, but is not in fact good title.

By decision dated November 22, 1978, Mary C. Pemberton, 38 IBLA 118 (1978), this Board, after consideration of the State Office decision rejecting appellant's color-of-title application, determined that appellant has not made out a meritorious Class 2 color-of-title claim, i.e., had failed to make a showing that she and her predecessors in interest have held the subject lands "under claim or color of title for the period commencing not later than January 1, 1901, to the date of application during which time they have paid taxes levied by State and local Government units, * * *." However, we referred this case to the Hearings Division for a fact finding hearing pursuant to 43 CFR 4.415, to consider whether appellant had alleged facts which, if proved, would entitle her to purchase the disputed tract on the basis of a Class 1 color-of-title claim. We noted that to establish a Class 1 claim in this case appellant must, at a minimum, show that good faith color of title arose in behalf of a predecessor in interest prior to September 4, 1902, the date on which the land was withdrawn for inclusion in the Absaroka Forest Reserve.

A hearing was duly held before Administrative Law Judge Robert W. Mesch on June 7, 1979, at Billings, Montana. The salient facts as developed from the case record and that hearing are essentially as follows: Appellant is asserting title to a 1.48-acre parcel which was a part of a 4.90-acre millsite claim located on September 23, 1886, as the "September Millsite," which was also identified as "Survey 66B" in survey No. 66 for Mineral District No. 2, plat approved by the U.S. Surveyor General for Montana on November 15, 1887. Title to the other 3.42 acres within the total 4.90-acre tract is not in dispute here.

The plat of Survey 66B shows that 4.90 acres were being claimed at that time under the September Mill Site location and that a 1.48-acre tract of the claimed land was in conflict with the unsurveyed Nevada King Mill Site Claim. The plat shows a metes-and-bounds description for the 4.90 acres and a metes-and-bounds description for the 1.48 acres in conflict with the Nevada King Claim. The Judge found that the plat depicts the September Mill Site as a parallelogram. He concludes that the parallelogram is destroyed with the removal of the 1.48 acres in conflict with the Nevada King Claim.

Patent No. 17923 was issued for the "September Millsite," inter alia, on May 22, 1891, to four persons -- Harry Gassert, Jacob Reding, William H. Randall, and Madison M. Black. The patent refers to the plat of survey and designates the millsite as Lot No. 66B. The following specific reservation is included in the patent:

> Expressly excepting and excluding from these presents all that portion of the ground hereinbefore described embraced in said Nevada King Millsite claim, and granted premises in said Lot No. 66B containing 3 acres and 42 hundredths of an acre, which together with the area embraced on said lot No. 66A, aggregates 24 acres and .08 of an acre of land, more or less.

It is not disputed that actual title to the 1.48-acre parcel in issue was not granted under the 1891 patent to appellant's predecessors in interest. The "September Millsite" conveyed only the 3.42-acre tract not contested here.

The land in issue was withdrawn as part of the Absaroka Forest Reserve on September 4, 1902, by Proclamation No. 39, and has been continuously withdrawn since then. 1/ Appellant traces her source of title to a quitclaim deed which preceded this withdrawal, dated June 12, 1902, from Adam Gassert to M. B. Strong in which Adam Gassert quitclaimed "all his right, title and interest in and to the September Mill Site, designated by the Surveyor General as Lot __, Survey __, New World Mining District, Park County, Montana." The deed does not contain any description of the September Mill Site or specify any lot or survey number. It does not give any indication as to whether Adam Gassert intended to quitclaim, or whether M. B. Strong had reason to believe he was obtaining title to, a September Mill Site of 3.42 acres as described in the 1891 patent, or a September Mill Site of 4.90 acres, which included the 1.48 acres excluded from the patent.

Appellant acquired the lands in issue under an October 9, 1952, general warranty deed passing the "September Mill Site, Mineral Survey No. 66B," from Hoosier's, Inc., to W. H. Pemberton, appellant's husband. The warranty deed specifically conveyed, "That certain tract of land located in Section Twenty-Six (26), Township Nine (9) South of Range Fourteen (14) East, M.P.M., known as the September Mill Site, Mineral Survey No. 66B, New World Mining District * * *." On February 9, 1966, W. H. Pemberton conveyed the same property to his wife and himself as joint tenants with right of survivorship. In her application, Mary C. Pemberton averred that she first learned that she did not have clear title to the disputed land in 1973. In our first decision of Mary C. Pemberton, supra, we set forth at great length, the applicable law governing consideration of this color of title application and directed the Judge to consider at the hearing, whether appellant's evidence created a good faith color of title in M. B. Strong, Adam Gassert's grantee, and appellant's predecessor in interest. We also pointed out that appellant must, at a minimum, show that the documents of record she introduces gave M. B. Strong justifiable reason or a reasonable basis to believe he had good title to the disputed 1.48 acres.

On August 2, 1979, Judge Mesch issued "Proposed Findings of Fact" in which he found that:

> The appellant's color of title application should be rejected because (1) she has not met her burden of proving

1/ Effective July 1, 1945, these lands were designated part of the Gallatin National Forest by Public Land Order No. 305 (11 FR 249 (Dec. 18, 1945)).

> that M. B. Strong has any reasonable basis to believe he was obtaining good title to the 1.48 acres excluded from the patent for the September Mill Site, and (2) if good faith possession under color of title arose prior to the 1902 withdrawal, there was a break in the chain of color of title as a result of the 1922 conveyance to Fanny S. Wetstein.

The Judge's proposed findings of fact were served upon the parties, by an order of this Board dated February 13, 1980. Appellant takes exception to the Judge's findings contending that there is not ample evidence in the record to support the conclusion that Mary C. Pemberton is statutorily entitled to the 1.48 acres in question. Appellant claims that the June 12, 1902, Gassert-Strong deed incorporates by reference the 1887 plat of the Surveyor General and that the Surveyor General originally treated the Pemberton cabin site as consisting of a parallelogram containing a 4.90-acre parcel. Appellant argues the Park County assessor has also relied on these U.S. maps to conclude that her lands consist of 4.90 acres and that they relied on blaze marks when they purchased the property in 1952 to show the size of the cabin site to be 4.90 acres.

[1] We have considered the record in light of appellant's submissions and we agree with Judge Mesch's findings. We hereby adopt these findings as the decision of the Board, a copy of which is attached hereto. We are not persuaded by appellant's written opposition to the Judge's findings that there is any basis for the approval of this color-of-title application. Appellant draws a completely different inference from the representation of Lot No. 66B on the 1887 Surveyor General's survey. Contrary to appellant's misconception, the Judge did not take the position "the 1887 plat is worthless."

The Judge correctly concluded that the 1887 plat of survey clearly depicted the conflicting area in question of the Nevada King Millsite Claim. When that survey, incorporated by reference in the patent, is viewed in conjunction with the very clear and specific exclusion and the designated acreage expressed in the patent, the obvious conclusion is that the patent was only intended to convey 3.42 acres.

In contrast to the specific direction of the 1891 patent, appellant relies on the erroneous assumption of the lot size as drawn from a nondescript quitclaim deed, which does not set forth the boundaries of the land at issue with any certainty. As we previously pointed out, extrinsic evidence could be introduced to make definite a description in a deed which is latently ambiguous as to what lands were conveyed. See Mable Farlow, 30 IBLA 320, 329, 84 I.D. 276, 280 (1977). However, appellant's extrinsic evidence as viewed by the Judge and this Board merely amounts to irreconcilable generalities in

later surveys which did not attempt to deal with the specific acreage limitation of Lot No. 66B. Nor were they clear and unequivocal representations of the lot that would overcome the specifics of the original patent.

Appellants also points to the Park County Tax Assessment records for verification of their claim to 4.90 acres (Gov't. Exh. 6). Yet these same records repeatedly recite either different acreages for Lot No. 66B or no acreage figures at all. The records are confusing, at best, and provide no reasonable basis for anyone to conclude the exact size of the this lot (Tr. 34-35). Moreover, appellant has indicated in her own presentation, that the county has changed the acreage figures on its records in 1975 from 4.90 to 3.42 acres on such questionable basis as a request from the Forest Service (Tr. 40). Similarly, appellant's reliance on blaze marks on trees to describe the outer limits of the lot and to refute the limitations of the original patent is of no persuasive value.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Anne Poindexter Lewis
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Frederick Fishman
Administrative Judge

August 2, 1979

MARY C. PEMBERTON,	:	MONTANA 40120
	:	
Appellant	:	Appeal from decision re !
	:	jecting color of title
v.	:	application
	:	
BUREAU OF LAND MANAGEMENT,	:	
	:	
Respondent	:	

PROPOSED FINDINGS OF FACT

Appearances: Rodney T. Hartman of Pedersen, Herndon,
Harper & Munro, Billings, Montana, for appellant;

Richard K. Aldrich, Office of the Solicitor,
Department of the Interior, Billings, Montana,
for respondent.

Before: Administrative Law Judge Mesch.

The Montana State Office, Bureau of Land Management, issued a decision on June 6, 1978, rejecting an application filed by Mary C. Pemberton under the Color of Title Act, as amended, 43 U.S.C. § 1068 et seq. The decision was appealed. On November 22, 1978, the Interior Board of Land Appeals ordered a fact-finding hearing pursuant to 43 CFR

4.415. Mary C. Pemberton, 38 IBLA 118. A hearing was held on June 7, 1979, at Billings, Montana. The parties have filed posthearing briefs.

The appellant is asserting a color of title claim to a 1.48-acre parcel of public land that was originally a part of a mill site claim designated as the September Mill Site. The September Mill Site was patented in 1891. A plat of survey for the September Mill Site, Survey No. 66B, was prepared in 1887. The plat shows that 4.90 acres were being claimed at that time under the September Mill Site location and that a 1.48-acre tract of the claimed land was in conflict with the unsurveyed Nevada King Mill Site Claim. The plat shows a metes-and-bounds description for the 4.90 acres and a metes-and-bounds description for the 1.48 acres in conflict with the Nevada King Claim. The plat depicts the September Mill Site as a parallelogram. The parallelogram is destroyed with the removal of the 1.48 acres in conflict with the Nevada King Claim. The patent for the September Mill Site refers to the plat of survey, designates the mill site as Lot No. 66B, describes the mill site by the metes-and-bounds description shown on the plat of survey and then states: "Expressly excepting and excluding from these presents all that portion of the ground hereinbefore described embraced in said Nevada King Millsite

claim, and granted premises in said Lot No. 66B containing [sic] 3 acres and 42 hundredths of an acre . . ." The excluded land is the 1.48 acres being claimed by the appellant.

In its decision ordering a hearing, the Board of Land Appeals stated that "appellant here must at a minimum show that good faith color of title arose in behalf of a predecessor in interest prior to September 4, 1902, the date on which the land in dispute was withdrawn for inclusion in the Absaroka Forest Reserve" (p. 122).

The appellant relies on a quitclaim deed dated June 12, 1902, from Adam Gassert to M. B. Strong in which Adam Gassert quitclaimed "all his right, title and interest in and to the September Millsite, designated by the Surveyor General as Lot __, Survey __, new World Mining District, Park County, Montana." The deed does not contain any description of the September Mill Site or specify any lot or survey number. It does not give any indication as to whether Adam Gassert intended to quitclaim, or whether M. B. Strong had reason to believe he was obtaining title to, a September Mill Site of 3.42 acres as described in the

1891 patent, or a September Mill Site of 4.90 acres, which included the 1.48 acres excluded from the patent. 1/

With respect to the above deed and the appellant's reliance thereon, the Board of Land Appeals stated:

> This Board has held that good faith under the Color of Title Act requires that a claimant -- or in this case her predecessor -- honestly believed that there was no defect in his title and that the Department may consider whether such a belief was unreasonable in light of the facts actually known or available to him. (p. 124)
>
> . . . [A]ppellant is entitled to a hearing at which evidence can be adduced and arguments made as to the meaning of maps, plats, etc., for color of title purposes, and where consideration may be given to whether or not such documents created a good faith color of title in M. B. Strong, Adam Gassert's grantee and appellant's predecessor in interest. (p. 125)
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> . . . Appellant must at a minimum show that the documents or records she introduces gave M. B. Strong justifiable reason or a reasonable basis to believe he had good title to the disputed 1.48 acres. (p. 125)

1/ Adam Gassert was a stranger to the title. There is nothing in the abstract of title or in other evidence of record that indicates Adam Gassert ever had any right, title or interest in the September Mill Site. This problem has not, however, been raised as an issue.

The only evidence produced in support of the proposition that M. B. Strong had a reasonable basis to believe he had good title to the 1.48 acres excluded from the patent covering the September Mill Site consists of two fractional survey plats relating to the township containing the land in question. The plats were prepared in 1891 and 1892. They both show Survey or Lot No. 66B as a parallelogram. The parallelogram as shown on the plats is smaller than the top of an eraser on a pencil. No conclusions can be drawn from the two plats as to the acreage included within the tract designated as 66B. If it is assumed that M. B. Strong was aware of the two fractional survey plats and therefore had reason to believe that the September Mill Site was a parallelogram, it must also be assumed that he was aware of the 1891 patent and the 1887 plat of survey and should have known that the September Mill Site as patented contained only 3.42 acres and was no longer in the form of a parallelogram.

In view of the evidence I simply cannot conclude that M. B. Strong had a reasonable basis to believe he was obtaining good title to the 1.48 acres excluded from the 1891 patent. If he had any reason to believe anything from the documents available to him, it would have been that title to the 1.48-acre tract remained in the United States.

The same reasoning would apply to other parties in the chain of title, and in particular to the appellant's deceased husband who was engaged in the real estate business when he obtained a warranty deed in 1952 conveying: "That certain tract of land located in Section Twenty-Six (26), Township Nine (9) South of Range Fourteen (14) East, M.P.M., known as the September Mill Site, Mineral Survey No. 66B, New World Mining District . . . ." It is difficult to believe that Mr. Pemberton was not aware of (1) the mineral survey plat showing the conflict between the September Mill Site and the Nevada King Claim, and (2) the patent showing that the conflicting 1.48 acres remained with the United States.

In its decision the Board of Land Appeals further stated:

> [U]nder the circumstances of this case, we believe, without deciding, that good faith possession must have been continuous after the June 12, 1902, conveyance in order for appellant now to have a valid claim, since the 1902 withdrawal would have become effective in the event of a break in good faith possession under color of title. (p. 125)

The respondent argues that a 1922 warranty deed to Fanny S. Wetstein conveying "1/2 September Millsite (Patented)" constitutes a break in the chain of color of title. I agree.

With respect to a similar conveyance the Board of Land Appeals in its decision in this case stated:

> [I]t is crystal clear that it does not convey the 1.48 acres in dispute in the instant case because this deed expressly states that "for full description See Patent from U.S." As we have noted above, the 1891 patent on its face excludes the 1.48 acres in issue from its grant. Since the reference in the 1893 deed to the 1891 patent gave William N. Nevitt reason to know that title to this tract remained in the United States, Nevitt cannot have held good faith color of title to the subject tract . . . . (pp. 121, 122)

The respondent has raised other issues questioning the validity of the color of title claim. I see no reason, however, to consider the other issues.

The appellant's color of title application should be rejected because (1) she has not met her burden of proving that M. B. Strong had any reasonable basis to believe he was obtaining good title to the 1.48 acres excluded from the patent for the September Mill Site, and (2) if good faith possession under color of title arose prior to the 1902 withdrawal, there was a break in the chain of color of

title as a result of the 1922 conveyance to Fanny S. Wetstein.

Robert W. Mesch
Administrative Law Judge